

FAIR LABOR STANDARDS ACT WAGE AND HOUR TRAINING

For City of Salisbury

Presented by
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March 7 & 14, 2019



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Why Are We Here Anyway? Managers and Supervisors



"Agents" of the City

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Why Are We Here Anyway? Potential for the **PERSONAL** Liability of Supervisors/Managers



- FLSA Contains BROAD definition of "employer"

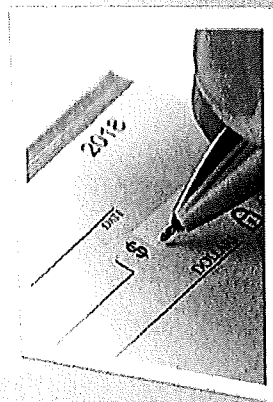
"... Any other person who acts, directly or indirectly, in the interest of the employer to any such employees of such employer."

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What this Means to YOU


- Supervisors/managers can be **SUED INDIVIDUALLY** for wage and hour violations under the FLSA



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Why Are We Here Anyway?


- To learn a bit about the FLSA and wage/hour laws, including common traps;
 - To help minimize risk of liability for the City and for supervisors/managers; and
 - To be familiar enough with the issues to know when to seek help.
 - We are NOT here to learn how to make our employees work more for less money and increase efficiency at all costs.
- 
- A cartoon illustration of a person holding a notepad and pen, standing next to a large, faint, stylized letter 'C'. The person is a simple, rounded figure with a large head and small body, wearing a dark shirt and pants. They are holding a notepad in their left hand and a pen in their right hand, appearing to be taking notes. The background is a light, textured surface. The large, faint, stylized letter 'C' is positioned to the right of the person, partially overlapping the edge of the slide.

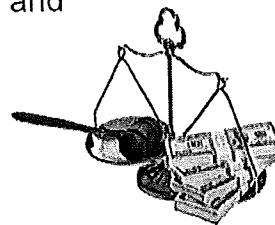


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FLSA Overtime Claims May Involve

- Employers mistakenly treating employees as “exempt” from the FLSA overtime requirements;
 - Employers failing to identify, record, or compensate “off-the-clock” hours spent by employees performing compensable, job-related activities; and
 - Failing to pay for all work time, which is “suffered or permitted.”
- 



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Three Basic Requirements Of The Fair Labor Standards Act

1. Payment to nonexempt employees of minimum wage for the first 40 hours.
2. Payment to nonexempt employees of time and one-half the "regular rate" for hours over 40.
3. An accurate record of hours worked.

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What is Overtime?

Fact or Fiction

Time actually worked over
40 hours in a work week is
"FLSA overtime."



Fact

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What is Overtime?

Fact or Fiction

FLSA overtime is one and a half times the employee's "regular rate."



Fact

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What is Overtime?

Fact or Fiction

FLSA overtime rules are triggered regardless if an employee's total hours actually worked in a work week are not more than 40.



Fiction

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Compensated For Time "Actually Worked"

- FLSA overtime pay for nonexempt employees is computed based on all the time the employee has actually worked in a work week.
- All time spent by an employee performing activities which are job-related is potentially "work time."

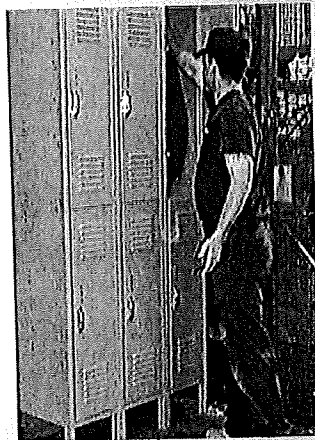


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Compensated For Time “Actually Worked”

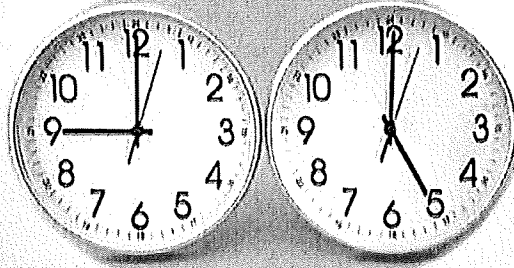
- This includes the employee's regular "on the clock" work time, plus, "off the clock" time spent performing job-related activities (which benefit the employer).
- Potential work is actual work if the employer "suffered or permitted" the employee to do it.



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- With only a few exceptions, all time an employee is required to be at the premises of the employer is work time.



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[illegible]

- Any work that is performed on behalf of City of Salisbury, including:
 - Bank runs, marketing activities, and other work-related tasks.
 - Meal breaks that are not a minimum duration of 30 uninterrupted minutes.
 - All travel time that occurs during the workday.
- Accurate Records of hours worked is the key.


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What is Work Time?

All regular shift time is work time.

Fact or Fiction?



Fact

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Fact or Fiction



Fact

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What Is Work Time?

"Breaks" and "nonproductive" time (for example, time spent by a receptionist reading a novel while waiting for the phone to ring) are not work time.

Fiction

Fact or Fiction?



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Fact or Fiction



Fiction

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What is Work Time?

All time spent by an employee performing work-related activities that the employer suffers or permits is work time, whether on premises or not and whether "required" or not.



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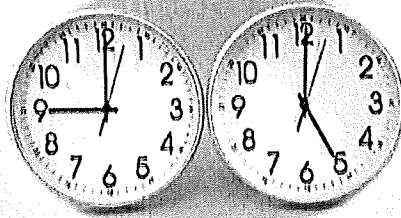
What Else is “Work Time”?

- Work done "at home" or at a place other than the normal work site is work, and the time must be counted.
- Work done on the way home, such as stopping by the post office to drop off office mail, must be counted.



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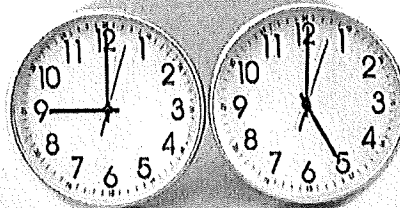
- "Unauthorized" or "unapproved" work is work and must be counted (provided that the employer knows/should know it is being done and permits the employee to do it).



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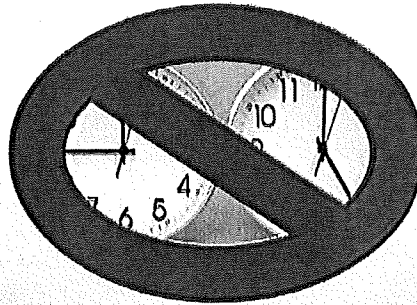
- It is the privilege and responsibility of the employer to "control the work" of its employees. If an employer does not wish an employee to perform work, it must prohibit the employee from doing so.



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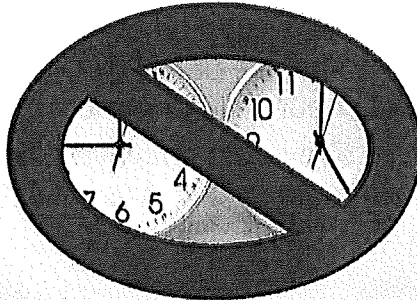
- "Time not worked" need not be included in computing FLSA pay due.



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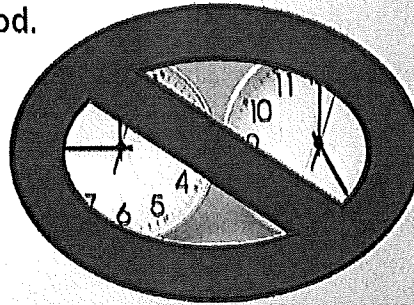
- Time not worked includes leave time (for whatever reason), even if leave time is considered "work time" for some other purpose.



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- Time not worked may also include bona fide meal periods (if there are meal periods), whether paid or unpaid, if the employee is actually relieved of active duties during the meal period.



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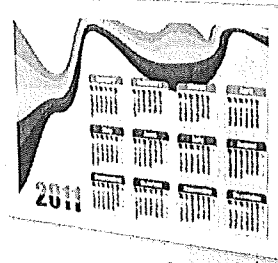
- Employee's regular shift is from 8 a.m. to 5 p.m. Monday-Friday, with an hour off for lunch.
 - If the employee actually takes lunch (with no interruptions), employee only works 40 hours. No OT needed.
- Same scenario but employee takes Thursday off for vacation. Even if employee uses PTO, employee only actually worked 32 hours. No OT owed.
- Same scenario as above but employee works through lunch and works double shift on Monday. Employee is owed 2 hours OT.

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The Work Week Standard

- The FLSA uses the work week as the standard for computing overtime pay due, and each work week stands alone.
- Work time may not be "averaged" from work week to work week.
 - For example, an employee who works 44 hours in week one, followed by 36 hours in week two, is entitled to 4 hours of FLSA overtime pay for week one and may not be paid based on an "average" of 80 hours in the two week period.

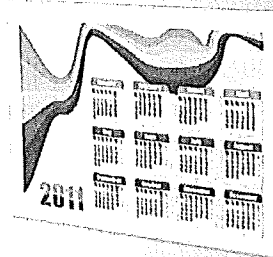


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The Work Week Standard

- Similarly, time worked in one work week may not be offset against time off in some other work week (except for some government employees).
- However, nothing in the FLSA guarantees any employee any particular amount of work time, or requires any particular schedule of work. An employer may "adjust schedules" within a work week to avoid an employee working FLSA overtime.

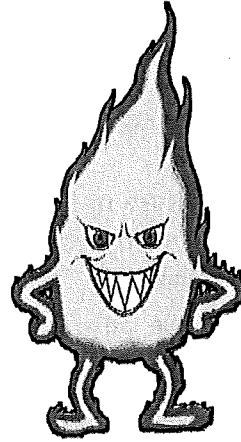


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Other Hot Issues

- Off-the-Clock Work
- Training Time
- Travel Time
- Meal periods



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Off-The-Clock Work

- Uncompensated "off-the-clock" time frequently occurs when employers fail to pay for work performed:
 - Before and after a worker's scheduled shift;
 - During an employee's scheduled meal period; and
 - While employees are attending staff meetings and compensable training sessions.

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Typical Indications Of Off-The-Clock Work:

- Late clock in times and early clock out times in relation to known work schedule or department's hours of operation
- Short hours at the end of the week
- Edits to employee time records (even if properly documented)
- Edits to time records that do not show a meal break to designate a meal break was taken

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Training time

- All training time is work time if it occurs during an employee's regular shift, or if it is required by the employer. Training time need not be counted as work time only if it:
 - a) occurs outside of an employee's normal work schedule;
 - b) is truly voluntary;
 - c) not directly related to the employee's current job;
 - d) the employee does no other work during the training.

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Travel time

- As a general rule, "home to work" and "work to home" travel time is not work time.
- However, this assumes that the employee is performing no other work activities while commuting.
 - For example, time spent by an employee writing a report is work time, even if it happens to occur while the employee is riding on a bus (or airplane) to or from work.

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Travel time

- Travel time which is “all in a day’s work” is work time.
- Usually, this means that travel time is work time if it occurs between when the employee first arrives at the first work site and before the employee leaves the last work site.
 - For example, an employee who travels to the office, picks up equipment, then goes to a work site to perform the day’s activities is working from the time s/he first arrives at the office.

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Travel time

- If employees are required to report to a central location from which they are dispatched to specific job sites, then the travel between the central location and the job site is compensable.
- Overnight travel out-of-town
 - If the travel is within the employee's regular work hours (even if on the weekend), the time is compensable.

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Preliminary/Postliminary Activities

- Custom or Practice
- Essential to Job
- Required by Law

Examples:

- Protective Clothing
- Showering
- Shift Change Discussions

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Meal periods

- Meal periods need not be counted as work time if they are at least 30 minutes long and the employee is relieved from active duties during the meal period.
- An employee who "works through lunch" is working and that time must be counted.
 - An employee who "eats a sandwich at the desk" and is not relieved of all duty is working through lunch.
 - BUT a meal period need not be counted as work time if the employee is merely expected to "remain available" during the meal period but is otherwise relieved of active work duties
- Employees can be required to stay on premises.

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Exemptions

Exempt vs. Non-Exempt

- All employees are non-exempt unless an exemption applies.
- Exemptions are narrowly construed against the employer.
- Remedial purposes of the FLSA
- Exemptions apply only to employees who are “plainly and unmistakably” within their terms

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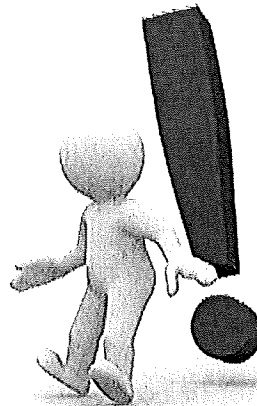
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- Employers have burden of proof to show that an exemption applies
- Standard for multi-plaintiff cases—collective actions—is lenient
- Wrap-around actions

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Authors' Note: Authors' names are listed alphabetically by last name. Correspondence concerning this article should be addressed to Dr. Robert C. Serfaty, Department of Psychology, University of Maryland System, College Park, MD 20742-7015; e-mail: rserfaty@um.edu.

- Executive
- Administrative
- Professional
- Outside Sales
- Computer Professionals

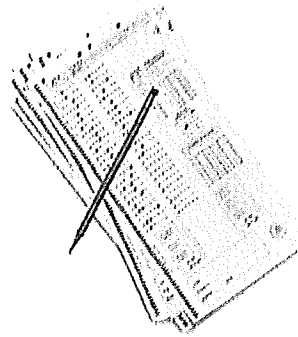


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Salary-Basis Test

- Regularly receives predetermined salary constituting all or part of compensation
- Not subject to reduction for quantity or quality of work performed
- Workweeks in which no work performed

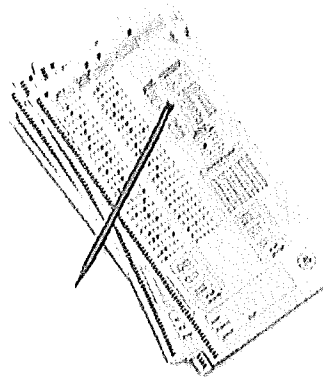


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Salary-Basis Test

- No deductions from salary for absences occasioned by employer or business's operating requirements
- No deductions from salary if ready, willing, and able to work—whether or not work available



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Pointers for Preserving Exempt Status

- No deductions for partial-day absences
- Pay weekly salary for any week in which any work is performed
- Part-time or on-call employees

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Permitted Salary Deductions

Seven exceptions from the "no pay-docking" rule:

1. Absence from work for one or more full days for personal reasons, other than sickness or disability.
2. Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy or practice of providing wage replacement benefits for these types of absences.
3. To offset any amounts received as payment for jury fees, witness fees, or military pay.
4. Penalties imposed in good faith for violating safety rules of "major significance."

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Safe Harbor

- The exemption will not be lost if the employer:
 - Has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism;
 - Reimburses employees for any improper deductions; and
 - Makes a good faith commitment to comply in the future.
- *Unless* the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

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Safe Harbor (cont'd)

Example of Safe Harbor Policy (29 C.F.R. § 541.603(d))

(Provided to each employee upon hiring and published in handbook, on Internet and/or in the office.)

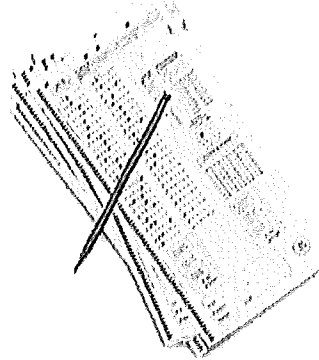
Deductions from Wages – Salaried Employees

FLSA does not permit improper or unauthorized deductions from exempt employees' salaries unless (1) the deduction is in compliance with federal and/or state FLSA laws, (2) the employee has authorized the deduction, or (3) the deduction is specifically permitted by the Fair Labor Standards Act. Any exempt employee who believes that his salary has been improperly reduced or subject to improper deductions should notify Employer's Administrator. Employer will promptly investigate any complaint; if the deduction was improper, Employer will reimburse the employee for the improper deduction. In addition, Employer will, in good faith, take all reasonable steps necessary to ensure that no such improper deductions are made in the future.

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Primary-Duty Test

- Principle, main, or important duty
- Based on all facts in particular case
- Emphasis on character of job as whole
- Importance of duty in relation to other duties

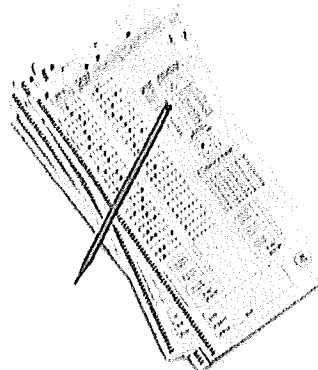


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Primary-Duty Test

- Amount of time spent on exempt work
- Relative freedom from supervision
- Amount of wages paid to other employees for non-exempt work
- Qualitative, not quantitative



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Executive Exemption

- Primary duty is managing enterprise or recognized department/subdivision
- Regularly directs work of two or more full-time employees or equivalent
- Has authority to hire or fire other employees
 - Or particular weight given to recommendations about changing status of other employees

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Administrative Exemption

- Primary duty is performing office or non-manual work that is directly related to management or business operations or customers and
- Primary duty requires exercising discretion and independent judgment about significant business matters

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Discretion & Independent Judgment

- Involves comparing and evaluating possible courses of action and then acting or making a decision after considering various possibilities
- Employee has authority or power to make an independent choice—free from immediate direction or supervision—about significant matters

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Discretion & Independent Judgment

- Not merely using skill in applying techniques, procedures, or standards
- Not merely making decisions about inconsequential matters

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Professional Exemption

- Performs work requiring advanced knowledge in field of science or learning
- Knowledge acquired by prolonged course of specialized intellectual instruction
- Work is predominantly intellectual in character
- Work requires the consistent exercise of discretion and judgment

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Computer-Professional Exemption

- Computer-systems analyst, computer programmer, software engineer, or similarly skilled worker in computer field
- Primary duty is systems-analysis techniques and procedures
- And consists of designing, developing, documenting, analyzing, creating, testing, or modifying computer systems or programs related to machine-operating systems

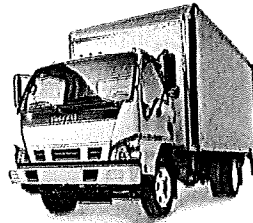


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Outside Sales


- Primary duty is making sales or obtaining orders or contracts for services or for use of facilities
- Customarily and regularly engaged away from place of business or other fixed site to sell employer's products, services, or facilities



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Highly Compensated Employees

- **Guaranteed \$100,000 in total annual compensation—**
including
commissions and
nondiscretionary bonuses
 - **Primary duty involves**
performing office or
non-manual work
 - **Customarily and regularly**
performs any exempt duties
or responsibilities
- 



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Penalties for Violations

- Two or three years statute of limitations
- Liquidated (double) damages
- Reasonable attorneys' fees
- Individual liability
- Criminal liability



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Retaliation (Whistleblower)

- Unlawful to retaliate for filing a complaint or testifying
- Threat to file action may be sufficient
- Any adverse employment action is prohibited



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The Dollars and "Sense" Of Compliance With The Fair Labor Standards Act

1. Assume 12 minutes a day of unpaid work time
2. One hour per week at \$15.75
3. Two-year liability for 6,000 employees = \$9,072,000!
4. Add liquidated (double) damages = \$18,144,000!
5. If found to be willful, increase by 50% = \$27,216,000!

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Managers and Supervisors Responsible for Enforcing Requirements of FLSA

- Asking or permitting employees to work off the clock is strictly prohibited.
- Asking or permitting employees to not record overtime worked is strictly prohibited.
- Immediately report any violation of the City's timekeeping payroll practices to human resources.

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Managers and Supervisors Responsible for Enforcing Requirements of FLSA

- Employees need to understand that working off the clock is a terminable offense.
- If overtime is worked, it must be paid – including unauthorized overtime.
- If an employee cannot complete his or her work in the time provided, the employee needs to discuss that with his or her manager or supervisor.

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What To Look For When Reviewing A Timesheet Report

- Workweeks that have exactly 40 hours recorded.
- Late clock ins and/or early clock outs.
- Failure to clock out.
- Workdays that appear to be uncommonly short in relation to the employee's work schedule.
- Workdays that routinely appear short toward the end of the workweek as an employee approaches 40 hours.
- Excessive time entry edit reports by employees, managers or supervisors.

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What To Look For When Reviewing A Timesheet Report

- That each employee has clocked in and out each workday during the pay period.
- That each employee has taken a meal break every workday of at least 30 minutes in duration.

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Anticipated Question Under FLSA

Q: Do I have to provide or authorize overtime?

A: No. The FLSA does not require employers to offer hourly employees overtime. However, when overtime is worked by employees, even if unauthorized, that time must be compensated at one and one-half times the employee's regular rate of pay.

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Anticipated Question Under FLSA

Q: May I control the hours worked of my employees?

A: Yes. However, if an employee works over his or her set schedule, the time must be compensated. The employee may be disciplined for performing work outside his or her scheduled work time, but the employee must be paid for all hours worked.

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Must Pay For Unauthorized Work Time

If management does not want the work to be performed, it is the duty of management in all cases to exercise its power of control and see that the work is not performed. The mere promulgation of a rule against unauthorized work is not enough. Management has the power to enforce the rule and must make every effort to do so.

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